FERNANDO HERRERA v. BUREAU OF LAND MANAGEMENT

IBLA 78-565 Decided December 8, 1978

Appeal from a decision of Administrative Law Judge Robert W. Mesch dismissing a hearing authorized by 43 CFR 9239.3-2(c)(4) to contest amounts due to the United States for a grazing trespass violation.

Reversed.

1. Administrative Procedure: Hearings--Grazing and Grazing Lands--Grazing Permits and Licenses: Trespass--Trespass: Generally

   Where the alleged trespasser makes no allegations of a specific and substantial nature regarding whether or not a trespass has in fact occurred, the procedure authorized by 43 CFR 9239.3-2(c)(4) (1977) limiting a hearing "to the determination of the amount of damages, value of the forage consumed, and any other amounts considered to be due the United States as a result of said trespass" does not result in a denial of due process.

   A hearing on the issue of whether or not a trespass was willful or not clearly willful is authorized by 43 CFR 9239.3-2(c)(4) (1977) because a finding on this issue affects the rate at which the value of the forage consumed shall be computed pursuant to 43 CFR 9239.3-2(c)(2).

2. Grazing and Grazing Lands--Grazing Permits and Licenses: Trespass--Trespass: Generally--Trespass: Measure of Damages

   In determining whether grazing trespasses are willful, intent sufficient to establish

willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent.

3. Administrative Procedure: Substantial Evidence-- Evidence: Burden of Proof--Evidence: Sufficiency

In a hearing held pursuant to the Administrative Procedure Act, evidence sufficient to support a decision must be reliable, probative, and substantial. 5 U.S.C. § 556(d)(1976).

4. Evidence: Burden of Proof--Grazing and Grazing Lands -- Grazing Permits and Licenses: Trespass--Trespass: Generally

Since a grazing trespass is not a criminal proceeding, it need not be proved beyond a reasonable doubt that a particular individual committed the trespass.

5. Grazing and Grazing Lands--Grazing Permits and Licenses: Trespass--Trespass: Generally

Evidence is insufficient to support a finding of a willful trespass where it fails to show that the alleged trespasser intended to disregard the regulation prohibiting trespass or that he was plainly indifferent to its requirements or that he acted with gross neglect of a known duty.

Where the administrative law judge does not make a finding as to whether a trespass was willful or not clearly willful, the Board of Land Appeals may make this finding based upon the record as if it were sitting as trier of fact.

6. Administrative Procedure: Generally--Administrative Procedure: Hearings--Constitutional Law: Due Process -- Grazing and Grazing Lands--Grazing Permits and Licenses: Trespass--Trespass: Generally

Where BLM has impounded five horses found to be trespassing on public lands closed to grazing and no notice and hearing are afforded to the owner of said animals prior to impoundment because the owner is unknown to BLM, the due process rights of said owner are not violated. The procedures authorized by 43 CFR 9239.3-2(c)(3) (1977) do not violate due process.

7. Constitutional Law: Generally--Grazing and Grazing Lands--Grazing Permits and Licenses: Trespass -- Trespass: Generally

The Property Clause of the United States Constitution, art. IV, § 3, cl. 2, gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them." When Congress so acts, the Federal legislation necessarily overrides conflicting State laws under the Supremacy Clause. U.S. Constitution, art. VI, cl. 2.

APPEARANCES: Gayle E. Manges, Esq., Office of the Solicitor, Department of the Interior, Santa Fe, New Mexico, for appellant. Joseph F. Gmuca, Esq., DNA People's Legal Services, Inc., Crownpoint, New Mexico, for respondent.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

The State Director, Bureau of Land Management (BLM), Santa Fe, New Mexico, appeals from a decision of Administrative Law Judge Robert W. Mesch, dated July 20, 1978, dismissing a hearing authorized by 43 CFR 9239.3-2(c)(4) (1977) to contest amounts due to the United States for a trespass violation. 1/

1/ The regulations for Unauthorized Grazing Use were amended and recodified as 43 CFR Subpart 4150, effective August 4, 1978. 43 FR 29074 (July 5, 1978).

On November 14, 1977, an employee of the Albuquerque District Office, Bureau of Land Management, observed from the air five horses roaming on land subject to the jurisdiction of BLM under the Taylor Grazing Act, as amended, 43 U.S.C. § 315 et seq. (1970). The horses were observed in Pasture 1 of the Pelon Allotment, sec. 14, T. 21 N., R. 5 W., New Mexico principal meridian. This area had been closed to unauthorized grazing of horses and other livestock by a closure order of September 15, 1977, signed by the State Director and published and posted in accordance with 43 CFR 9239.3-2(c)(5) (1977).

Without further attempt to identify the owner of the horses, the BLM employee radioed to the Rio Puerco Resource area office and asked that BLM's livestock contractor be contacted to impound the horses in question. Impoundment was in fact completed later in the day, and the horses were taken to Cuba, New Mexico.

In Cuba, the identity of the owner of the horses, Fernando Herrera, was established by a third party who recognized the brand on the impounded horses. BLM thereafter charged Herrera with a trespass violation under 43 CFR 4112.3-1(a) (1977). 2/ On November 17, 1977, BLM proferred to Herrera a printed form setting forth impoundment and trespass costs of $225.80 and including only the following three options:

> 1. I accept responsibility for this debt to the Bureau of Land Management and offer total payment on return for release of the impounded animals.
>
> 2. I understand the circumstances resulting in impoundment by the Bureau of Land Management. I feel these charges are excessive and request a hearing be scheduled before an examiner of the Bureau of Land Management. At this time I am delivering a cash/corporate surety bond of $225.80 in lieu of payment to obtain release of impounded animals.
>
> 3. I understand the situation which resulted in animals belonging to me being impounded and trespass charges imposed. I refuse to pay the charges and release claim of these animals to the Bureau of Land Management to sell at public auction for satisfaction of impoundment and trespass charges.

2/ 43 CFR 4112.3-1, Acts prohibited, states in part as follows: "The following acts are prohibited on the Federal range:
"(a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, including stock driveways, without an appropriate license or permit, regular or free-use, or a crossing permit."

Herrera signed option No. 2, posted a bond in amount of $225.80, and thereafter a hearing was held before Administrative Law Judge Mesch in accordance with this stipulation.

Although 43 CFR 9239.3-2(c)(4) (1977) limits such a hearing "to the determination of the amount of damages, value of the forage consumed, and any other amounts considered to be due the United States as a result of said trespass," Judge Mesch requested that BLM present evidence on the fact of the trespass itself.

BLM presented uncontradicted evidence of the following facts, inter alia:

1. On November 14, 1977, five horses were observed on public land.

2. The land in question was closed to grazing pursuant to a properly noticed closure order.

3. The horses belonged to Fernando Herrera.

In the absence of Herrera at the hearing, his counsel, Joseph F. Gmuca, testified to the condition of certain fences bordering the public lands in question. No additional evidence was offered by counsel for Herrera, and the case was thereafter submitted to Judge Mesch for decision.

On July 20, 1978, Judge Mesch ruled in favor of Herrera and held that the hearing procedure authorized by 43 CFR 9239.3-2(c)(4) (1977) was inapplicable, because it did not afford a hearing on the issue of whether or not a trespass had in fact occurred. Accordingly, the trespass proceeding was dismissed, and BLM was directed to return the bond posted by Herrera.

We hereby reverse the decision of Judge Mesch and find that a trespass has been established. We further find that the impoundment fees assessed are reasonable, but the value of forage consumed is to be recalculated to reflect the rate applicable to a trespass not clearly willful.

[1] We hold that where, as here, the alleged trespasser makes no allegations of a specific and substantial nature regarding whether or not a trespass has in fact occurred, the procedure authorized by 43 CFR 9239.3-2(c)(4) (1977) does not result in a denial of due process.

At no time did Herrera question or deny the fact that horses belonging to him were observed roaming on Federal lands closed to grazing. In the absence of specific and substantial allegations denying the fact of a trespass itself, no hearing is necessary on this issue. Hence, we need not decide whether this Board should

exercise its discretion pursuant to 43 CFR 4.415 to refer the issue of a trespass for a hearing.

This Board reasoned similarly in Ruth E. Han, 13 IBLA 296, 80 I.D. 698 (1973), and Coronado Development Corporation, 19 IBLA 71 (1975), wherein we denied hearings regarding Section 15 grazing leases where the lessees had failed to allege facts which, if proved, would demonstrate a basis for a hearing.

Judge Mesch properly heard evidence on the issue of whether the trespass was willful or not clearly willful, because a finding on this issue affects the rate at which the value of forage shall be computed. 43 CFR 9239.3-2(c)(2) (1977). Again, uncontradicted evidence at the hearing established the following facts:

1. The horses had traveled approximately 6 miles in 24 hours from Herrera's house to a pasture in the Pelon Allotment (Tr. 17).

2. Three to four watering holes were located between Herrera's house and the pasture in the Pelon Allotment wherein the horses were found (Tr. 31).

3. At least four fences were located between Herrera's house and the pasture in the Pelon Allotment wherein the horses were found (Tr. 32).

4. The Pelon Allotment is entirely fenced and cross fenced (Tr. 35).

5. The gates of the pasture wherein the horses were found were closed at the time of the impoundment (Tr. 20).

6. A cattle guard was located along the course between Herrera's house and the pasture in the Pelon Allotment wherein the horses were found (Tr. 18, 20).

The above evidence, however, is an insufficient basis for us to find that Herrera has committed a willful trespass.

[2] In determining whether grazing trespasses are willful, intent sufficient to establish willfulness may be shown by proof of facts which objectively show that the circumstances do not comport with the notion that the trespasser acted in good faith or innocent mistake, or that his conduct was so lacking in reasonableness or responsibility that it became reckless or negligent. Eldon Brinkerhoff, 24 IBLA 324, 83 I.D. 185 (1976).

[3] In a hearing held pursuant to the Administrative Procedure Act, evidence sufficient to support a decision must be reliable, probative, and substantial. 5 U.S.C. § 556(d) (1976).

[4] Since a grazing trespass is not a criminal proceeding, it need not be proved beyond a reasonable doubt that a particular individual committed the trespass. Bureau of Land Management v. Ross Babcock, 32 IBLA 174, 84 I.D. 475 (1977).

[5] BLM alleges that Herrera's trespass was willful and accordingly assessed Herrera at double the commercial rate for value of forage consumed pursuant to 43 CFR 9239.3-2(c)(2) (1977). The evidence assembled above, however, does not support a willful trespass, because it fails to show that Herrera intended to disregard the regulation or that he was plainly indifferent to its requirements or that he acted with gross neglect of a known duty. Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397 (1976).

Where, as here, the administrative law judge did not make a finding as to whether the trespass was willful or not clearly willful, this Board may make this finding based upon the record as if it were sitting as trier of fact. Eldon Brinkerhoff, supra.

At the hearing before Judge Mesch, counsel for Herrera argued that BLM had violated the due process rights of his client by failing to afford Herrera notice and hearing of the intended seizure of his horses. Counsel cites for this proposition the well known case of Fuentes v. Shevin,
407 U.S. 67 (1972). In the Fuentes case, household articles purchased under a conditional sales contract were seized by State agents acting under a replevin statute which allowed seizure of such goods prior to a hearing.

Herrera's challenge to BLM's procedures in the present case is a challenge to the provisions of 43 CFR 9239.3-2(c)(3) (1977) for it is this subsection which authorized BLM's actions. This subsection reads:

> (3) In any case where neither the owner of the trespassing livestock, or his representative, is known, or where conservation of the Federal range and of the forage thereon requires it, the district manager, when so authorized by written order of the State Director, may take steps to remove the trespassing livestock by such methods and by such means not inconsistent with legislation which prohibits the use of airborne or motor-driven vehicles in the gathering of horses or burros, as may be necessary and to dispose of them by sale or otherwise within not less than five (5) days after public notice of his intention to make such disposition, subject to the right of any owner or registered lienholder of such trespassing livestock to redeem the livestock * * *.

There is no question that the identity of the owner of the trespassing horses was unknown prior to and, even for a period of time,

after the impoundment of the horses. The horses in question were "wilder than saddle animals" and their brands very difficult to read under a coat of winter fur (Tr. 35).

There is similarly no question that the impoundment was authorized by the written order of the State Director (Govt. Exh. #2).

[6] The challenge which Herrera mounts goes to the constitutionality of subsection (3) quoted above. We note, however, two rather important distinctions which would make the rule of law enunciated in the Fuentes case inapplicable to the facts at hand. Unlike the Fuentes case, the identity of the party entitled to possession of the seized property was unknown. Surely the requirement of notice and hearing prior to seizure assumes that the identity of the party entitled to such rights is known. The Fuentes case cannot be invoked to require BLM to go to extreme measures prior to impoundment to determine the ownership of five free-spirted horses under a coat of winter fur in the middle of an obscure pasture.

A second distinction is also present. Unlike the Fuentes case, no property was removed or seized from the possession of one lawfully entitled thereto. The property impounded by BLM was seized while trespassing on public land and destroying the forage thereon. To require compliance with the Fuentes rule would be to require BLM to allow the trespass to continue and the forage to be destroyed while it sought to determine the identity of the owner of the animals. Fuentes could be further argued to require BLM to allow the horses to remain in trespass prior to a hearing on the trespass action. Surely a case rooted in the law of secured transactions of a commercial nature cannot be so extended.

Finally, counsel for Herrera argues that New Mexico statute 47-17-1, N.M.S.A., is applicable to the facts at hand and serves as a defense to the Government's trespass charges. This statute reads in part: "[N]ecessity for fence. - Every gardener, farmer, planter or other person having lands or crops that would be injured by trespassing animals, shall make a sufficient fence about his land in cultivation, or other lands that may be so injured."

New Mexico courts, counsel argues, have held this statute to require that one wishing to keep livestock off his property fence them out. Hence, absent a showing by BLM that the public lands were completely fenced, BLM could not prevail in a trespass action. This is a horse soon curried.

[7] In Utah Power & Light Co. v. United States, 243 U.S. 389, 405 (1917), the United States Supreme Court noted that the Property Clause of the United States Constitution, art. IV, § 3, cl. 2, gives Congress the power over the public lands "to control their occupancy and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them."

In Kleppe v. New Mexico, 426 U.S. 529 (1976), the court held:

> Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. * * * And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. U.S. Const., Act VI, cl. 2 * * *. As we said in Camfield v. United States, 167 U.S., at 256, in response to a somewhat different claim: "A different rule would place the public domain of the United States completely at the mercy of state legislation." [Citations omitted.]

The Federal laws and regulations are the relevant body of laws in this case. Bureau of Land Management v. Ross Babcock, supra. The elements of a trespass violation are set forth in 43 CFR 4112.3-1 (1977) quoted above as footnote 1. To the extent that New Mexico law conflicts with the terms of this regulation, New Mexico law must recede.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed. We find that Fernando Herrera is responsible for the trespass of five horses on public lands in New Mexico Grazing District No. 1 closed to grazing and that he is liable for payment of $205 for impoundment charges. We do not find the trespass was clearly willful and remand the case to the BLM State Director for New Mexico to compute the value of the forage consumed by the trespassing horses, payment for which must be made by Herrera.

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Douglas E. Henriques
Administrative Judge

We concur:

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Anne Poindexter Lewis
Administrative Judge

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Edward W. Stuebing
Administrative Judge